Nos. 10-1542 and 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Ninth Circuit has held that aliens who do not personally satisfy the eligibility requirements for cancellation of removal under 8 U.S.C. 1229b(a)(1) and (2)—that is, who have not had the status of a lawful permanent resident (LPR) for at least five years and who have not continuously resided in the United States for at least seven years after they have been admitted by immigration authorities—may nevertheless become eligible for such relief by relying on a parent's period of LPR

status and continuous residence after admission. The Ninth Circuit's imputation rule finds no support in the text of Section 1229b(a) or its legislative history, and it is contrary to the authoritative interpretation of the Board of Immigration Appeals (BIA or Board). Although respondents attempt to defend the rule by reference to lower courts' interpretations of other, differently worded immigration provisions and to general policy considerations, their efforts are unavailing.

A. The Plain Text Of Section 1229b(a) Does Not Permit An Alien To Rely On A Parent's Years Of LPR Status Or Residence After Admission By Immigration Authorities

Section 1229b(a) provides that, to be eligible for cancellation of removal, "the alien" seeking relief must, *inter alia*, "(1) ha[ve] been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) ha[ve] resided in the United States continuously for 7 years after having been admitted in any status." Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the terms "lawfully admitted for permanent residence" and "admitted" both refer to formal action taken by immigration authorities with respect to an individual alien. See 8 U.S.C. 1101(a)(20); 8 U.S.C. 1101(a)(13)(A). Sections 1229b(a)(1) and (2) require that the alien seeking relief personally achieve the requisite legal status, and remain in that status and reside in the United States for the requisite length of time.

Respondents do not dispute that the text of the statute requires that the alien seeking relief personally fulfill these requirements. They contend (Martinez Gutierrez Br. 16, 20; Sawyers Br. 14-15), however, that Section 1229b(a) is "silent" as to whether an alien can personally

fulfill these requirements by relying on *someone else's* years accrued in the requisite status.

Respondents' argument that Section 1229b(a) by its terms neither authorizes nor forecloses imputing a parent's (or other third party's) years as an LPR or of continuous residence after admission is not helpful to respondents' case: were Section 1229b(a) truly ambiguous on the point, then the BIA's reasonable interpretation of the statute as forbidding imputation would control. See Gov't Br. 33-39; pp. 18-22, *infra*. But the argument is also incorrect. As those courts that ultimately deferred to the BIA's interpretation have acknowledged, "[t]he requirements for cancellation of removal are clear." *Augustin* v. *Attorney Gen. of the United States*, 520 F.3d 264, 270 (3d Cir. 2008); see *Deus* v. *Holder*, 591 F.3d 807, 812 (5th Cir. 2009) (adopting the rationale of *Augustin*). An alien who has not in fact been an LPR for at least five years, or who has not in fact been admitted to the United States by immigration officials and resided continuously in the United States for at least seven years after that admission, has not fulfilled the statutory eligibility requirements for cancellation of removal, regardless of whether a parent (or any other third party) has done so.

It is true, as respondents emphasize, that Section 1229b(a) does not contain language specifically referring to a parent and foreclosing the possibility of imputing the parent's years in the requisite legal status. But "[a] statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997); see Gov't Br. 20-21. There is no ambiguity here.

B. There Is No Settled Rule Permitting An Alien To Rely On A Parent's Period Of LPR Status Or Residence After Admission

Notwithstanding the clarity of Section 1229b(a)'s text, respondents argue (Martinez Gutierrez Br. 21-22, 28-29, 33-39; Sawyers Br. 14-36) that imputation is a well-accepted feature of immigration law and that Congress thus must have ratified the imputation rule when it enacted Section 1229b(a). But while certain forms of imputation have been permitted under other, differently worded provisions of immigration law, respondents can point to no settled rule that would permit a minor child to rely on a parent's years of LPR status or years of continuous residence in the United States after admission under Section 1229b(a).

1. Appellate decisions interpreting the term "domicile" in former Section 212(c) do not establish any settled understanding about imputing a parent's years of LPR status or residence after admission

a. Respondents' congressional ratification argument relies primarily on three court of appeals decisions interpreting Section 1229b(a)'s predecessor, former Section 212(c) of the INA, which authorized waiver of exclusion (and, by judicial and administrative interpretation, deportation) for "[a]liens lawfully admitted for permanent residence" who had accrued "a lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. 1182(c) (1988); see Gov't Br. 6 n.2.

The decisions on which respondents rely reasoned that the undefined term "domicile" must be construed in light of its meaning at common law. As this Court had explained in *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30 (1989), an adult's "domicile" is

generally "established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Id.* at 48. But "[s]ince most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Ibid.*; see also *ibid.* (noting that these principles mean that a child's domicile will sometimes be in a place he has never been). Following that common-law principle, courts of appeals construing former Section 212(c) concluded that parents' period of "lawful unrelinquished domicile" could be "imputed" to their minor children. *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1025 (9th Cir. 1994) ("[A] child's domicile follows that of his or her parents."); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) (similar) (citations omitted); see also *Morel* v. *INS*, 90 F.3d 833, 841 (3d Cir. 1996) (similar), vacated on other grounds, 144 F.3d 248 (3d Cir. 1998).

b. Respondents provide no persuasive reason to believe that the Congress that enacted Section 1229b(a) somehow ratified these interpretations of former Section 212(c), much less that Section 1229b(a) incorporates the result in those decisions. As an initial matter, with respect to Martinez Gutierrez, the ratification argument fails on its own terms. There was no consensus among the circuits that would have entitled him to relief even under former Section 212(c). To the contrary, the Ninth Circuit made clear that its imputation rule would *not* apply to an alien who, like Martinez Gutierrez (see Martinez Gutierrez Pet. App. 12a-13a), did not obtain LPR status before the age of 18, *Lepe-Guitron*, 16 F.3d at 1026 n.12, and no other court of appeals disagreed. This flaw greatly undermines respondents' reliance on a notion of ratification more generally.

More fundamentally, even assuming with respect to other applications of former Section 212(c) that three court of appeals decisions qualify as "a judicial consensus so broad and unquestioned that [this Court] must presume Congress knew of and endorsed it," *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005); but cf. *id.* at 351 (doubting force of a two-circuit consensus), the doctrine of congressional ratification applies only when Congress reenacts a statute without change, see *id.* at 349; *Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484, 2492 (2009). That is not the case here. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a), 110 Stat. 3009-594, Congress repealed former Section 212(c) and enacted a new relief-from-removal provision that differed in important respects from its predecessor. Section 1229b(a) preserved former Section 212(c)'s threshold requirement that the alien have been "lawfully admitted for permanent residence," but added an express durational requirement: that the alien have been in LPR status for at least five years. 8 U.S.C. 1229b(a)(1). It also replaced the seven-year "domicile" requirement with a requirement that the alien have resided continuously in the United States for seven years after admission in any status. 8 U.S.C. 1229b(a)(2).

The Congress that enacted Section 1229b(a) thus not only changed the language of former Section 212(c), but changed it to eliminate the very term—"domicile"—on which prior judicial decisions permitting imputation under Section 212(c) had rested. If Congress is presumed to have been aware of those decisions, then it must also be presumed to have intended that, by eliminating the word "domicile," it was eliminating the textual basis for

those decisions. Contrary to Martinez Gutierrez's suggestion (Br. 37), no other form of "disavow[al]" is needed to conclude that the enactment of Section 1229b(a) did not ratify and much less carry forward the result of those decisions.

2. The text of Section 1229b(a) differs materially from former Section 212(c)

Respondents (Martinez Gutierrez Br. 37-39; Sawyers Br. 17-19, 24-36) both seek to minimize the effect of the change from the text of former Section 212(c) to the text of current Section 1229b(a), but their efforts are unavailing.

a. Focusing on Section 1229b(a)(2)'s requirement that the alien have "continuously resided" in the United States for seven years after having been admitted by immigration authorities, Sawyers argues (Br. 36) that the new requirement is essentially synonymous with former Section 212(c)'s requirement of "lawful unrelinquished domicile." That is incorrect.

i. While the appellate decisions on which respondents rely interpreted the undefined term "domicile" in accordance with the common-law rule that a child's domicile follows that of his parents, no decision establishes that admission and years of residence following admission of the applicant's parent constitute compliance with those requirements by the applicant himself. And indeed, even the rationale underlying the common-law domicile rule—that "minors are legally incapable of forming the requisite intent to establish a domicile," *Holyfield*, 490 U.S. at 48—has no relevance for purposes of Section 1229b(a)(2). In contrast to the undefined term "domicile," neither the term "admitted" nor the term "residence" invites any consideration of the alien's

intent. "Admission" is the conferral of an authorization by immigration officials; it cannot be achieved unilaterally by the actions and intent of the alien, as domicile might. See 8 U.S.C. 1101(a)(13)(A) (defining the terms "admission" and "admitted"). And "residence" is defined as a person's "principal, actual dwelling place in fact, *without regard to intent.*" 8 U.S.C. 1101(a)(33) (emphasis added); see Gov't Br. 17, 28-29.

ii. Sawyers asserts that the term "resided continuously" (unlike the unadorned "resided") is a "term of art" that "has always been understood to include an intent component." Br. 25 (emphasis omitted). "If intent (and a child's inability to formulate it) is the linchpin of imputation," Sawyers reasons, "Section 212(c) and Section 1229b(a)(2) are in the relevant sense identical." *Ibid.* That, too, is incorrect.

As support for his claim that "resided continuously" is a term of art distinct from the defined term "resided," Sawyers cites *In re A-*, 4 I. & N. Dec. 723 (B.I.A. 1952), a Board decision interpreting a 1936 statute that predated the INA's definition of "residence" as being determined "without regard to intent." See Sawyers Br. 26; *id.* at 31 (noting that the current definition of "residence" was enacted as part of the INA in 1952); see also *id.* at 27 n.16 (discussing a 1943 Board decision). Sawyers cites no situations in which the Board has, since 1952, considered "resided continuously" to be a term of art that (unlike "resided") incorporates considerations of intent.[1]

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[1] Sawyers cites (Br. 27-28) the Board's decision in *In re Huang*, 19 I. & N. Dec. 749 (1988), the Ninth Circuit's decision in *Singh* v. *Reno*, 113 F.3d 1512 (1997), and the Regional Commissioner's decision in *In re Ng*, 12 I. & N. Dec. 411 (1967). None of those cases considered the meaning of the term "resided continuously."

In any event, the intent relevant to the discussion of the term "resided continuously" in *In re A-* was not intent to remain in a certain place from a given time forward, as under the law of domicile. It rather concerned the effect of subsequent temporary absences: such absences would not "operate to interrupt the continuity of residence" if "unaccompanied by an intent to abandon residence in the United States." *In re A-*, 4 I. & N. Dec. at 725. The relevant intent thus related not to whether an alien "resided" in a particular place but to whether the alien's residence in that place was "continuous." Thus, while a parent's intent to abandon residence in the United States could be imputed to a minor alien who left the country with the parent, see Gov't Br. 38-39, it does not follow that the parent's intent would similarly be relevant in determining whether the alien has established actual residence in the United States in the first place.[2]

iii. Sawyers also argues (Br. 33-36) that even if Section 1229b(a)(2) forbids any consideration of the alien's

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[2] Contrary to Sawyers's implication (Br. 29-30), this Court in *INS* v. *Phinpathya*, 464 U.S. 183 (1984), did not "equat[e] 'maintenance of a domicile' * * * with 'continuous residence' " except insofar as it observed that both concepts, unlike the concept of "continuous physical presence," accommodate temporary absences from the United States. *Id.* at 191. That observation has no relevance here.

Sawyers's reliance (Br. 30-31) on the legalization provision, 8 U.S.C. 1255a, is also misplaced. There is no indication that Section 1255a's reference to the alien's continuing intention to adjust to LPR status, see 8 U.S.C. 1255a(b)(1)(B)(ii) and (3)(A), has any significance outside the context of that provision. Moreover, the provision does not purport to define the term "resided continuously," instead authorizing the Attorney General to promulgate regulations. 8 U.S.C. 1255a(g). By their terms, the regulations do not incorporate considerations of the alien's intent. See 8 C.F.R. 245a.1(c).

intent, the courts that permitted imputation of domicile under former Section 212(c) were also necessarily imputing residence as an element of domicile. As the authorities discussed in *Holyfield* make clear, the common-law rule that a child's domicile follows that of his parent means that his domicile may be in a location in which he does not in fact reside. See 490 U.S. at 48; see also, *e.g.*, *Yarborough* v. *Yarborough*, 290 U.S. 202, 211 (1933). But even among the few courts of appeals to address the imputation issue, there was no settled consensus as to whether imputation was permissible when the child did not reside in the United States. While the Second Circuit, for example, held that imputation was permissible under those circumstances, see *Rosario*, 962 F.2d at 225, the Ninth Circuit had no occasion to decide the issue because the alien in *Lepe-Guitron* had arrived in the United States at the same time as his parents and remained in the country after that time, see 16 F.3d at 1025. *Lepe-Guitron* did acknowledge the result in *Rosario* with apparent approval, see *id.* at 1026, but in subsequent cases the Ninth Circuit has described *Lepe-Guitron* as limited to unemancipated minors "residing with [their] parents" in the United States. *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1023-1024 (2005); see also *Barrios* v. *Holder*, 581 F.3d 849, 865 (2009).

iv. Residence in the United States alone does not, of course, satisfy Section 1229b(a)(2); the required seven years of continuous residence must follow admission of the alien by immigration authorities. Respondents fail to establish any settled understanding that would permit the requirement that the alien himself have been admitted under the INA to be satisfied by the admission of *someone else*, including the alien's parent. As the government has previously explained, the Ninth Circuit in

Lepe-Guitron had no occasion to consider the issue. See Gov't Br. 37-38. And as the Ninth Circuit emphasized in that case, the alien there seeking relief had entered the United States legally with his parents. 16 F.3d at 1024.[3]

b. With respect to Section 1229b(a)(1)'s separate five-year requirement for LPR status, respondents fail to identify any plausible textual hook for imputation. Martinez Gutierrez argues in passing (Br. 38) that Section 1229b(a)(1)'s reference to "permanent residence" should be understood as inviting the same sort of inquiry into intent as "domicile." But the statute refers to "an alien lawfully admitted for permanent residence," 8 U.S.C. 1229b(a)(1), not "permanent residence" alone. Unlike "resided continuously," the phrase "lawfully admitted for permanent residence" *is* a statutory term of art: "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). The statutory definition of the term thus makes clear that it is a legal status formally conferred by the government; the alien's (or his parent's) unilateral conduct or intent are irrelevant, and the statutory definition accordingly makes no reference to intent.

Any contention that the Congress that enacted Section 1229b(a)(1) intended to endorse imputation of LPR status is particularly untenable. The court of appeals

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[3] Under Ninth Circuit precedent, an *adult's* period of lawful unrelinquished domicile could not begin until she obtained LPR status, rather than on the day she was admitted by immigration authorities. 16 F.3d at 1025; see *id.* at 1024. The court in *Lepe-Guitron* rejected that interpretation with respect to minors. *Id.* at 1025; see *id.* at 1026 n.12 (stating that only adults must be LPRs to accrue years of lawful unrelinquished domicile); Gov't Br. 37-38.

decisions on which respondents rely all made clear that LPR status was a threshold requirement "separate and independent" of the seven-year domicile requirement, and each court accordingly required that the alien child be an LPR in his own right in order to be eligible for Section 212(c) relief. *Rosario*, 962 F.2d at 223; see *id.* at 221; *Lepe-Guitron*, 16 F.3d at 1022-1023, 1026 n.12; see also *Morel*, 90 F.3d at 835, 839.[4] In Section 1229b(a)(1), Congress preserved that threshold requirement, but added a durational requirement to it: that the alien have had his LPR status for at least five years. In the absence of any precedent for imputing LPR status, Martinez Gutierrez cannot plausibly allege the existence of a settled understanding on the subject that Congress might be thought to have ratified.

3. Respondents identify no other authority establishing a settled understanding about imputing a parent's years of LPR status or residence after admission

Respondents' other efforts to establish that imputation is a "pervasive and well-settled" feature of the law, Sawyers Br. 16, are similarly unavailing.

Respondents note, for example (Martinez Gutierrez Br. 22-23; Sawyers Br. 15-16, 40-41), that the BIA has imputed a parent's actual or constructive knowledge to a child in considering whether the child is eligible for relief under 8 U.S.C. 1182(k), which permits the Attor-

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[4] Martinez Gutierrez's assertion (Br. 23) that "no court has viewed [the phrase 'lawfully admitted for permanent residence'] as foreclosing the imputation under former Section 212(c)" is correct only insofar as he means to suggest that no court read that phrase as forbidding an alien child who was an LPR in his own right from relying on imputation to satisfy the separate eligibility condition of seven years of lawful unrelinquished domicile.

ney General to waive inadmissibility if he concludes that "inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure." See *Senica* v. *INS*, 16 F.3d 1013, 1014-1015 & n.2 (9th Cir. 1994). They also note (Martinez Gutierrez Br. 53-54; Sawyers Br. 27-28) that imputation has been permitted in the context of determining whether an alien has *abandoned* LPR status, an inquiry that implicates considerations of the alien's intent. See, *e.g.*, *In re Huang*, 19 I. & N. Dec. 749, 755 (B.I.A. 1988). Section 1229b(a), by contrast, does not refer to the alien's knowledge or otherwise implicate the alien's state of mind. It refers to a legal status that every individual alien must have been granted by the government in his own right. There is no general background proposition that such a legal status may be imputed from parent to child.

Respondents also rely (Martinez Gutierrez Br. 52; Sawyers Br. 39-40) on cases discussing firm resettlement, but they fail to establish the existence of any settled imputation rule. The administrative decision they cite, which was issued by the Regional Commissioner of the former Immigration and Naturalization Service rather than the Board itself, considered the actions of the minor applicant for refugee classification; the extent to which the decision rested on "imput[ation]" is unclear. *In re Ng*, 12 I. & N. Dec. 411, 412 (1967). And as the Ninth Circuit noted in *Vang* v. *INS*, 146 F.3d 1114 (1998), the BIA in that case had "applied the firm resettlement factors directly to [the minor] rather than to his parents," *id.* at 1117, although the Ninth Circuit affirmed the Board's decision based on consideration of the parents' resettlement, *ibid.*

In any event, isolated examples of cases in which certain forms of imputation have been allowed under unrelated immigration-law provisions provide no support for the proposition that Section 1229b(a) allows imputation to satisfy its distinct requirements.[5]

C. Respondents' Policy Arguments Do Not Permit An Interpretation At Odds With The Statutory Language

Respondents repeatedly assert (Martinez Gutierrez Br. 15, 18, 40-42, 44-48; Sawyers Br. 20-22, 42-45) that Congress could not have intended to forbid imputation under Section 1229b(a) because imputation is consistent with general policy goals of the INA and Section 1229b(a). Respondents' policy arguments cannot override the plain text of Section 1229b(a).

1. As explained in the government's opening brief (at 24-27), the limited legislative history that exists contains no indication that the Congress that enacted Section 1229b(a) even considered the possibility, much less affirmatively intended, that an alien seeking cancellation would be able to rely on someone else's period of LPR status, admission by immigration authorities, or residence after admission. Sawyers argues, however, that Congress could not have intended to preclude imputation, given what he asserts was Congress's intent to

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[5] Respondents likewise fail to establish any general rule that permits courts to impute the conduct of one person or entity to another whenever imputation would "vindicate statutory purposes." Martinez Gutierrez Br. 24. Certainly neither the "responsible corporate officer" doctrine articulated in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), nor cases affirming the place of common-law vicarious or agency liability principles in certain statutory schemes, *e.g.*, *American Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 567 (1982), stand for any such principle.

"liberalize[] the relief-from-removal rule in other respects." Br. 10; see *id.* at 20-21.

Sawyers's characterization of Section 1229b(a) is incomplete. The legislative history indicates that the Congress that enacted Section 1229b(a) had a number of goals, including resolving a conflict among the circuits about whether the seven years of "lawful unrelinquished domicile" required for relief under former Section 212(c) had to follow the granting of LPR status to the alien or whether the alien could count years in some other lawful status. See Gov't Br. 24-27. In those circuits that had adopted the former rule, Section 1229b(a) did "liberalize" the availability of relief by reducing the required number of years in LPR status from seven to five. But in those circuits that had adopted the latter rule, Section 1229b(a)(1)'s five-year LPR status requirement rendered the statute more, rather than less, stringent than its predecessor.

Other provisions of Section 1229b(a) make clear that Congress did not enact the statute with the purpose of categorically expanding the availability of relief. As Sawyers acknowledges (Br. 20 n.11), Section 1229b(a) limited the availability of relief from removal by adding a new "stop-time" rule designed to ensure that aliens would not accrue time toward eligibility for relief after commission of a specified crime or by delaying their immigration proceedings. See 8 U.S.C. 1229b(a)(3), 1229b(d)(1); Gov't Br. 24-25. It also carried forward a set of new restrictions for aliens convicted of certain crimes. See *INS* v. *St. Cyr*, 533 U.S. 289, 297 (2001) (describing 1990 and 1996 predecessors to Section 1229b(a)(3)). There is thus no reason to believe, based on supposed "liberalizing" effects of Section 1229b(a), that Congress would have wanted courts to recognize an

exception to Section 1229b(a)'s requirements that appears nowhere in the statute's text.

2. Respondents' argument that imputation "serves the dual purpose of promoting family unity and protecting individuals who have strong ties to the United States" (Martinez Gutierrez Br. 1), does not establish that Congress must have intended imputation to be available under Section 1229b(a)(1) and (2).

As an initial matter, respondents do not dispute that the aliens who would seek to invoke the Ninth Circuit's imputation rule are not typically unempancipated minors seeking to reunite or remain with their parents in the United States. They are, rather, adults who—like respondents themselves—seek to avoid removal after committing removable offenses.

In any event, although the goals respondents identify undoubtedly underlie a number of provisions of immigration law, Congress has not single-mindedly pursued those goals without regard to competing objectives. See Gov't Br. 30-33. Virtually any limitation on eligibility for cancellation of removal will have the effect of barring relief for some individuals who may have family or other ties in the United States. But while an alien's family ties and the strength of his ties to the United States are taken into account in deciding whether an alien who is eligible for cancellation of removal should be granted that relief as a matter of discretion, *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998), they cannot serve to make an alien eligible in the first place if he has not fulfilled the statutory requirements.

3. Martinez Gutierrez argues (Br. 19) that imputation is particularly warranted in cases like his because "he was unquestionably eligible for lawful permanent residence from the time his father sought it on his be-

half," and his "delay" in obtaining LPR status was "a product solely of the systemic operation of quotas and the delays inherent in bureaucratic processing of applications." See also *id.* at 42 (stating that "the delay was solely a result of the visa backlog" for children of LPRs).

As a legal matter, Martinez Gutierrez was not in fact eligible for LPR status from the time his father submitted the application, because no visa was immediately available to him. 8 U.S.C. 1255(i)(2)(B). Nor, as a general matter, is the decision whether to grant an application for adjustment to LPR status a mere formality or ministerial act. The rule Martinez Gutierrez asks this Court to adopt would effectively short-circuit the statutory scheme, allowing an alien to benefit from his parent's LPR status even if the alien at the time had not satisfied or could not satisfy the eligibility requirements. See *In re Escobar*, 24 I. & N. Dec. 231, 234-235 (B.I.A. 2007).

It is true, as the government has previously explained, that there has for decades been a backlog for visas allocated to spouses and minor children of certain LPRs. Gov't Br. 31-32. But despite its awareness of that backlog, the Congress did not take action to eliminate or reduce it. *Id.* at 32 & n.11. Furthermore, Congress drafted Section 1229b(a) in a manner that expressly turns on the length of time the alien actually had the status of an LPR after having been formally accorded that status by the government, without regard to whether an alien's adjustment application could have been granted earlier if there had been no visa backlog or other impediment. There is no reason to believe that Congress intended to authorize courts to craft an extra-textual imputation rule to override that requirement or to excuse the alien's non-compliance because of limita-

tions on the availability of visas that are established features of the statutory scheme and experience under it.

4. Respondents' policy arguments ultimately boil down to the proposition that Congress could not have meant what it said when it enacted Section 1229b(a)(1) and (2), and that it could not have intended to do what it did when it eliminated statutory language that some courts had previously interpreted to permit imputation of compliance with one feature of the former Section 212(c). The best evidence of Congress's intent is, however, the text of the statute Congress enacted. In Section 1229b(a), Congress "struck the balance it thought right"; "the judicial role is to enforce that congressionally determined balance." *Milner* v. *Department of the Navy*, 131 S. Ct. 1259, 1265 n.5 (2011).

D. The Board's Reasonable Interpretation Of The Statute Is Entitled To Deference

Section 1229b(a) unambiguously requires that, to be eligible for relief, an alien must in fact have spent no less than five years in the status of an LPR, and no less than seven years residing in the United States following his own admission by immigration authorities. But should the Court conclude that the statute is ambiguous about whether an alien who does not meet the durational requirements is entitled to rely on a parent's years as an LPR or residence after admission, the BIA's interpretation is at a minimum reasonable and entitled to *Chevron* deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

1. Respondents do not contend (nor could they) that the Board's interpretation of Section 1229b(a), as set out in its published decisions, is inconsistent with the text of

the statute. Rather, they assert that the Board's interpretation is not entitled to deference because it does not reflect the Board's expertise or exercise of discretion, but instead the Board's belief that its interpretation "was mandated by the plain language of the statute." Martinez Gutierrez Br. 29; see also Sawyers Br. 38-39.

Contrary to respondents' characterization, the Board decisions at issue did not stop at step one of the *Chevron* analysis. The Board's analysis departed from the Ninth Circuit's premise that Section 1229b(a) is "silent on the issue of imputing lawful permanent residence." *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600 (2008) (citing *Cuevas-Gaspar*, 430 F.3d at 1022). Relying on *Chevron* and *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), the Board took the position that, despite the Ninth Circuit's contrary precedent, the court was bound to defer to the Board's interpretation at *Chevron* step two. See *Ramirez-Vargas*, 24 I. & N. Dec. at 600-601.

Moreover, the Board's analysis did not rest solely on its reading of the "clear language of the statute." *Escobar*, 24 I. & N. Dec. at 235. The Board also explained that "there is no logical or legal basis to consider the residence of a minor alien's parents in determining whether the minor acquired the necessary years of residence," *id.* at 233; that imputing LPR status from a parent to a child is inconsistent with Board precedent governing adjustment to LPR status, *id.* at 234; that imputation of LPR status is not compelled by Board precedent concerning imputation of the abandonment of LPR status, *id.* at 234 n.4; and that imputation of LPR status would create significant holes in the administration of the statutory scheme, *id.* at 234 n.5. The Board's inter-

pretation was, in short, rooted in the Board's unique authority and expertise.[6]

2. Respondents also claim (Martinez Gutierrez Br. 54; Sawyers Br. 39-42) that the Board is not entitled to *Chevron* deference because the Board's treatment of imputation has been "inconsistent." This argument too lacks merit. Critically, respondents do not dispute that the Board has consistently rejected imputation under Section 1229b(a). And although the Board has imputed a parent's *state of mind* for purposes of evaluating a child's abandonment of LPR status and actual or constructive knowledge of admissibility, it has not imputed a parent's years of LPR status or residence following admission to the parent's minor children. See Gov't Br. 38-39.

Sawyers insists (Br. 39-40) that the firm resettlement cases demonstrate that the Board has imputed "objective conduct," and not just state of mind, from a parent to a child. But as noted above, see pp. 13, *supra*, the Regional Commissioner's decision in *Ng* evaluated the alien child's own "objective conduct," and the extent to which it relied on imputation principles is unclear. But even had the Board itself taken a different approach to imputation in other contexts, that does not mean it was required to allow imputation in the distinct context of Section 1229b(a). And in any event, as "the agency adequately explain[ed] the reasons for" its interpretation of these particular statutory provisions, any purported inconsistency with prior decisions "is not invali-

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[6] Even if this Court were to determine that the Board's analysis was limited by an erroneous belief that its interpretation was compelled by the statutory text, the "proper course" would be to remand to the Board "for additional investigation or explanation." *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009) (citation omitted).

dating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Brand X*, 545 U.S. at 981 (internal quotation marks and citation omitted).

3. Contrary to respondents' argument (Sawyers Br. 37-38; see also Martinez Gutierrez Br. 54), the BIA's interpretation should not be disregarded on the view that Section 1229b(a) should be construed in favor of the alien. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Even application of the rule of lenity in criminal cases requires more than "[t]he simple existence of some statutory ambiguity"; it requires a "grievous ambiguity" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). No such ambiguity is present in this case: Section 1229b(a) plainly requires that an alien actually have been an LPR for at least five years and have continuously resided in the United States for at least seven years after admission.

Moreover, the INA expressly confers on the Attorney General the authority to resolve ambiguities in the first instance. See 8 U.S.C. 1103(a)(1) and (g); *Aguirre-Aguirre*, 526 U.S. at 424-425. If courts were required to resolve any and all ambiguities in the alien's favor, that would wholly usurp the Attorney General's interpretive authority. A court thus properly considers whether statutory ambiguities should be resolved in favor of the alien only after the court has used every interpretive tool at its disposal, including application of deference principles under *Chevron*. Cf. *Negusie* v. *Holder*, 555 U.S. 511, 518 (2009) (the "rule of lenity" may be relevant in reviewing agency action for reasonableness, but does

not establish that a statute is unambiguous such that deference is unwarranted). Because the statute's text, history, and authoritative interpretation by the Board all provide a complete answer to the questions presented, principles of liberal construction have no application.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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